84-1703

No.....

Supreme Court, U.S.
FILED
APR 29 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

ANTHONY EHLENFELDT,

Petitioner,

v.

C. W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN, AND FRANK WSOL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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40pp

QUESTIONS PRESENTED

The Court of Appeals ruled that Ehlenfeldt must show intentional misconduct on the Union's part and that he failed to do so. The questions presented on this petition are:

1. What is the standard of conduct governing the duty of fair representation and the breach thereof under Section 301 of the National Labor Relations Act (29 U.S.C. § 185)?

2. Assuming the Court of Appeals applied the correct standard of conduct below, did the Court nevertheless err in affirming the District Court's order granting the motions of respondents for summary judgment?

PARTIES

The petitioner, Anthony Ehlenfeldt ("Ehlenfeldt") respectfully prays that a writ of certiorari issued to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered January 29, 1985.

The named parties are the only parties to this litigation.

OPINION BELOW

The Order (opinion) of the Court of Appeals for the Seventh Circuit, not published, appears in Appendix A to this Petition. The decision rendered by the United States District Court for the Western District of Wisconsin on respondents' motion for summary judgment appears in Appendix B. The Judgment of the Court of Appeals appears in Appendix C and the Judgment of the District Court appears in Appendix D. 29 U.S.C. Section 185 appears in Appendix E.

JURISDICTION

The Judgment and Order of the Court of Appeals for the Seventh Circuit was entered on January 29, 1985. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

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STATUTES INVOLVED

Ehlenfeldt brought this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. This statute is set forth in Appendix E.

STATEMENT OF THE CASE

This petition arises from the District Court's order granting the respondents' motion for summary judgment and dismissing the petitioner's complaint as amended in *Anthony Ehlenfeldt v. C. W. Transport, Inc., Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, William Close, Thomas O'Malley, Leroy Rankin, and Frank Wsol,* Civil Action No. 82-C-768-S (W.D. Wis.), an action filed by Ehlenfeldt on September 24, 1982. Ehlenfeldt's complaint as amended alleges that the Company wrongfully discharged him from his position of employment and that the Union breached the duty of fair representation which it owed him, all in violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

Ehlenfeldt's amended complaint alleges that the Union and the Company conspired to deprive Ehlenfeldt of substantial pension benefits to which he was entitled under the Local 710 International Brotherhood of Teamsters Pension Plan ("Plan"). Ehlenfeldt was employed by the Company as an over-the-road driver for 19½ continuous years of service preceding his discharge of March 25, 1982. At the time of his discharge, Ehlenfeldt was 51

years of age and had earned 19 years of pension credit under the Plan. A minimum of 20 years of pension credit is required before an employee becomes eligible for a majority of the benefits made available under the Plan. Ehlenfeldt became ineligible to participate in the majority of these benefits at the time of his discharge since it occurred some 6 months prior to the vesting of his 20th pension credit.

Both the Company and the Union had knowledge as to Ehlenfeldt's pension status. Ehlenfeldt desired to participate in the Early Retirement Benefit. In October of 1981 or approximately 5 months prior to his discharge, Ehlenfeldt informed the Company that he was planning to retire upon the completion of his 20th year of employment so that he could get the 20 year retirement. The Company responded by stating that Ehlenfeldt was not old enough to retire. Similarly, Ehlenfeldt's Union steward told Ehlenfeldt after the arbitration hearing regarding his discharge that he thought Ehlenfeldt did not have enough pension credits to be eligible for this particular plan.

Ehlenfeldt was discharged for the alleged delay of freight. Ehlenfeldt grieved that his discharge was not for just cause because his delay of freight was excusable in that he had become ill by way of exhaust fumes entering the cab of his truck. Because of his illness, Ehlenfeldt was obligated to immediately cease operation of his vehicle pursuant to applicable Motor Carrier Safety Regulations.

The Union, Ehlenfeldt claims, failed to represent him. The Union did not investigate the mechanical condition of

the vehicle which Ehlenfeldt was operating. They did not contact the driver who operated the vehicle after Ehlenfeldt. They did not review Ehlenfeldt's personnel file even though they were aware that it might have contained supportive information. They advised Ehlenfeldt not to bring supportive documentation to the hearing. They advised Ehlenfeldt to execute a Waiver of Ten Day Notice despite the fact that Ehlenfeldt's Union representative had done nothing with respect to Ehlenfeldt's grievance prior to the arbitration hearing. They allowed the Company to present evidence at the hearing which should have been disallowed pursuant to the collective bargaining agreement. They failed to present evidence of Ehlenfeldt's numerous safe-driving awards. They failed to bring up Ehlenfeldt's seniority even though they knew this was a good crutch to grab onto. They failed to present Ehlenfeldt's rebuttal letter at the hearing and instead instructed Ehlenfeldt not to present a written argument which he had prepared prior to the hearing. Indeed, the Union appeared at Ehlenfeldt's arbitration hearing with an empty file.

Perhaps of even greater importance, the Union failed to show that Ehlenfeldt was the victim of discrimination. Of the approximately 85 truckers within Ehlenfeldt's division at the Company, 30 had experienced problems with delay of freight on a continuous basis; had received frequent warning letters; and yet only one of those employees was discharged. The one employee who was discharged for delay of freight was actually reinstated the next day. However, this employee was again discharged for delaying freight during his very next shift. Ehlenfeldt was

singled out for his delay of freight because of his pension status.

The arbitration hearing lasted approximately 20 minutes. The arbitration committee comprised solely of Union and Company representatives simply denied Ehlenfeldt's grievance without indicating the basis for its decision. Their only written decision was the statement "Appeal Denied, Discharge Stands."

On January 27, 1984, the District Court granted the motions of the respondents for summary judgment and ordered Ehlenfeldt's complaint dismissed. Relying upon *Hoffman v. Lonza,* 658 F.2d 519 (7th Cir. 1981) and *Dober v. Roadway Express, Inc.,* 707 F.2d 292 (7th Cir. 1983), the District Court ruled that an inference of intentional misconduct could not be made. This resulted in a final judgment dated February 7, 1984 which was appealed to the Seventh Circuit.

On January 29, 1985, the Seventh Circuit issued an order affirming the District Court's order and judgment. The Seventh Circuit acknowledged that *Hoffman* and *Dober* were controlling and required a showing of intentional misconduct. The Seventh Circuit conceded that Ehlenfeldt had presented a theory of malicious discrimination regarding his pension status but ruled that Ehlenheldt had failed to prove that his theory was actually operative in practice. This order of the Seventh Circuit resulted in a judgment of the same date which is the basis of the instant petition.

REASONS FOR GRANTING THE WRIT

I.

The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Decisions Of This Court Because It Does Not Recognize The Arbitrary Or Perfunctory Breach Of The Duty Of Fair Representation.

The Seventh Circuit, in affirming the District Court's order granting the motions of the respondents for summary judgment, relied solely on the standard of "intentional misconduct" as adopted in *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981) and confirmed in *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983). In *Dober* the Seventh Circuit stated in no uncertain terms the standard it was bound to follow:

> There are many suits in this Circuit over the duty of fair representation, and potential parties to those suits—workers, unions, employers—and the bar of this Circuit have a right to know what standard we follow, so we reaffirm that the standard is "intentional misconduct." 707 F.2d at 295.

The Seventh Circuit's standard of intentional misconduct conflicts with this Court's standard regarding the breach of the duty of fair representation. This Court in *Vaca v. Sipes*, 386 U.S. 171 (1966) enunciated the legal standard for duty of fair representation cases. A "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." 386 U.S. at 190. In the context of the Union's duty to enforce the grievance and arbitration procedures

in a collective bargaining agreement, this Court held that there was no breach by the union's exercising its discretion in deciding not to appeal a grievance to arbitration. But, at the same time, this Court further held that a union could have violated its duty to the claimant had it "arbitrarily ignore(d) a meritorious grievance or process(ed) it in perfunctory fashion." 386 U.S. at 191.

Clearly, "processing a grievance in a perfunctory manner" implies a broader standard than intent, and reflects the Court's concern with the quality and manner of the union's performance. *Jones, The Origins Of The Concept Of The Duty Of Fair Representation,* THE DUTY OF FAIR REPRESENTATION (1977), page 37. Indeed, "the reference in the Supreme Court decision in *Vaca* . . . to 'perfunctory' processing of grievances invites the finding of a violation when injury is caused by union carelessness without more." *Gorman, Basic Text on Labor Law* (1976), page 720.

In fact, the standard actually represents a range from negligence to intentional. The standard "arbitrary, discriminatory or in bad faith" is disjunctive. *Vaca* expressly rejected an argument that only obvious breaches such as discrimination or hostile treatment would be actionable. *Dober,* 707 F.2d at 296 (quoting *Baldini v. Local 1095, VAW,* 581 F.2d 150 (7th Cir. 1978) (Cudahy, J., concurring)).

This Court in *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1975) *sub silentio* approved a gross negligence standard for duty of fair representation claims. In *Hines,* the union had carried a grievance through arbitration, but failed to investigate the employer's charges

against the employees, or to present any other evidence at the arbitration hearing.

The District Court had granted a motion for summary judgment for both the union and the employer, concluding that although the facts demonstrated the union's bad judgment and failure to meet professional standards of competence, there were insufficient facts to show a breach of the duty of fair representation by the union and that therefore the arbitration committee's decision was final and binding on the employees. In review, the Court of Appeals for the Sixth Circuit concluded that the facts were sufficient to support an inference of bad faith or arbitrary conduct on the part of the union. The Sixth Circuit, however, upheld the dismissal of the employer, on the theory that there was no evidence of any misconduct on the part of the employer, and wholly insufficient evidence of any conspiracy between the union and the employer. It was on the latter issue that this Court reversed, holding that the employer need not be implicated in the bad faith or misconduct of the union to sustain an action by the employees against the employer for breach of contract.

Significantly, this Court did not take issue at all with the Sixth Circuit on the issue of the breach of the duty of fair representation by the union. See *Jones, id.*, page 41. In fact, this Court supported the extension of a duty of fair representation action, under the *Vaca* standard, to a post-arbitration context.

This Court in *Hines* again reiterated the union's duty to represent employees "honestly and in good faith and without discrimination or arbitrary conduct and stated

that the ruling in *Vaca* stemmed from an evaluation of the manner in which the union had handled a grievance in its earlier stages and that a union could breach the duty of fair representation if it utilized the contractual grievance procedures in such a way as to "seriously undermine the integrity of the arbitral process." 424 U.S. 567, 570. Thus, this Court, by inference, has approved the extension of the *Vaca* standard to a consideration of the Union's manner of processing a grievance through arbitration. By not taking issue with the Sixth Circuit's decision, this Court has *sub silentio* approved a gross negligence standard within the grievance processing context.

It should be clear that intentional misconduct is not the *sine qua non* of a breach of the duty of fair representation. The Seventh Circuit's reliance upon intentional misconduct as a sole standard of governing the breach of the duty of fair representation conflicts with this Court's prior decisions on the matter. The legal standard of this Court for the breach of the duty of fair representation is broader than "intentional misconduct." This conflict must be resolved.

II.

The Standard Of Intentional Misconduct Of The Seventh Circuit Is In Conflict With The Standard Of Conduct Applied By Several Of The Other Circuit Courts Of Appeal.

At a minimum, the standard of intentional misconduct espoused by the Seventh Circuit is in direct conflict with the standard of conduct applied by the Circuit Courts of Appeal in the Fourth Circuit, Sixth Circuit, Eighth

Circuit, Ninth Circuit, and Tenth Circuit. Those circuits are of the opinion that the standard for the breach of the duty of fair representation is broader than the standard of intentional misconduct as adopted by the Seventh Circuit. See *Griffin v. Intl. Union, United Auto Workers,* 469 F.2d 181, 183 (4th Cir. 1972) [breach may be established without any hostile motive of discrimination and in complete good faith where a course of action or inaction is unreasonable and arbitrary]; *Farmer v. ARA Services, Inc.,* 660 F.2d 1096, 1103 (6th Cir. 1981) [bad faith or fraud is not a necessary element of a charge of unfair representation if the union's conduct is otherwise arbitrary or perfunctory]; *Curtis v. United Transp. Union,* 700 F.2d 457, 458 (8th Cir. 1983) [to support a claim that the union acted in a perfunctory manner, there must be evidence that the union acted without concern or solicitude, or gave a claim only cursory attention]; *Dutrisac v. Caterpillar Tractor Co.,* 113 LRRM 3532, 3537 (9th Cir. 1983) [union negligence may breach the duty of fair representation in cases where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim]; *Faust v. International Brotherhood of Elec. Workers,* 572 F.2d 710, 715 (10th Cir. 1978) [union's duty includes an obligation to avoid arbitrary conduct].

The Fourth Circuit in *Griffin* indicated that "[t]he repeated references in *Vaca* to 'arbitrary' union conduct reflected a calculated broadening of the fair representation standard. *Id.* at 183 (quoting *Retan v. Apartment, Motel, Hotel and El. Op. U., Local 14,* 453 F.2d 1018, 1023 N.8 (9th Cir. 1972) [Feller, "*Vaca v. Sipes,* One Year

Later'' in N.Y.U. 20—First Annual Conference on Labor 141, 167 (1969)). This is the very acknowledgment that the Seventh Circuit has failed to make. The Circuit Courts of Appeal are in disagreement and will remain so until this Court makes a definitive statement as to the specific standard of conduct to be applied to the duty of fair representation and the breach thereof. Such clarification is needed at the present time.

III.

Even Assuming The Intentional Misconduct Standard Applied By The Seventh Circuit Is The Correct Standard, The Seventh Circuit Nevertheless Erred When It Applied The Standard To The Individual Facts Of This Case.

The District Court in considering the motions of the respondents for summary judgment, stated that "this Court can accept for purposes of this motion" that:

> Ehlenfeldt has arguably established that the Union and its agents failed to investigate his grievance; failed to adequately advise him as to the Waiver Agreement; permitted the Company to make reference to warning letters far outside the nine month prohibition within the Agreement; failed to present Ehlenfeldt's letter and rebuttal to the warning letter of October 29, 1981; and failed to present supportive information in Ehlenfeldt's defense. Further, Ehlenfeldt has arguably established that the company and its agents terminated Ehlenfeldt without just cause and that numerous other employees were also guilty of delay of freight and yet were not discharged. Appendix at page 12.

These facts, when viewed in light of the respondents' motive to deprive Ehlenfeldt of his substantial pension

benefits created a material issue of fact as to whether or not the Union had breached its duty of fair representation. This is especially true since summary judgment is particularly inappropriate where the underlying issue is one of motive or intent. *Egger v. Phillips,* 669 F.2d 497, 502 (7th Cir. 1982).

Even assuming that the standard of intentional misconduct was the standard to apply in this case, the Seventh Circuit applied that standard incorrectly to the facts of this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner,
Anthony Ehlenfeldt

Dated at Madison, Wisconsin, this 29th day of April, 1985.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued November 2, 1984

January 29, 1985

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. CLEMENT F. HAYNSWORTH, JR., Senior Circuit Judge*

ANTHONY EHLENFELDT,

Plaintiff-Appellant,

No. 84-1302 vs.

C. W. TRANSPORT, INC. AND LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 82 C 781
John C. Shabaz, Judge

---

*The Honorable Clement F. Haynsworth, Jr., United States Senior Circuit Judge for the Fourth Circuit Court of Appeals, sitting by designation.

ORDER

After an arbitration committee upheld Ehlenfeldt's discharge by his employer, C. W. Transport, Inc., he brought this action charging his local union with violation of its duty of fair representation and his employer with breach of contract in effecting his discharge. Summary judgment went against him in the district court.

I.

Plaintiff was discharged from his job as a truck driver for excessive delays in the delivery of freight. He claimed that the delay on the occasion which precipitated the discharge was necessitated by the fact that the cab had filled with exhaust fumes and that his stop was justified as a safety precaution.

The union steward assisted him in filing a grievance, and the union agent, Wsol, unsuccessfully sought to persuade the employer to reinstate him. The matter was then taken to the contract grievance procedure.

Accompanied by the union steward and the union agent, Ehlenfeldt appeared before the arbitration committee for a hearing. It was then explained to him that he was entitled to prior notice of ten days, which had not run, and that he was entitled to additional time if he wished it. Indeed, he was admonished about the matter more than once, but he insisted that he wished the hearing to proceed that day. At the conclusion of the hearing, the plaintiff stated that his entire case had been presented.

Thereafter, the committee upheld the discharge.

II.

The plaintiff complains that the union mishandled his grievance. He charges that the investigation before the hearing was inadequate and that the union representatives should not have permitted him to sign a waiver of the ten-day notice to which he was entitled. He complains of the receipt by the committee of a warning letter issued within the contractually allowable nine month period preceding the termination, but which contained references to earlier warnings issued more than nine months before his discharge. Finally, he complains that the union representatives failed to present a letter written by the plaintiff in response to the last warning letter he had received.

Oddly, no one sought to introduce any information about the condition of the truck and a possible malfunction in its exhaust system.

All of this suggests that union representatives might have been better prepared than they were, and that their representation was substantially imperfect. That is beside the point, however, for the plaintiff cannot maintain in the district court an action for breach of his union's duty of fair representation unless he can show intentional misconduct on the union's part. *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1982); *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981). Unintentional conduct by union officials might constitute an unfair labor practice within the remedial jurisdiction of the National Labor Relations Board, but the federal courts should not preempt the Board's exclusive jurisdiction to adjudicate such matters. *See Amalgamated Assn. of Street, Electric,*

Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971).

III.

The plaintiff attempted to meet his burden of showing deliberate union misconduct. The plaintiff asserts that at the time of his discharge he had earned nineteen years of credits under the Teamsters Pension Plan. Under that Plan, many benefits would have vested after completion of twenty years' service, but upon his termination after only nineteen years of service, his eligibility was computed on the basis of only ten years of service.

Presentation of a theory of malicious subordination of his rights is not enough. If he is to avoid summary judgment against him, he must introduce evidence that the theory was operative in practice and that he was actually the victim of intentional misconduct consistent with the theory. *Graf v. Elgin, Joiliet & Eastern Ry. Co.*, 697 F.2d 771 (1983).

The plaintiff offered nothing to prove that his theory was actually operative in practice. There was no proof that union representatives had any incentive to protect the fund from properly maturing claims. There was no suggestion of a practice of acquiescence in the discharge of employees whose retirement rights were near the vesting point. The plaintiff had been reinstated after an earlier discharge after intervention of union representatives, and the plaintiff had enjoyed good and amiable relations with the union representatives.

Thus, while he offers a bare theory of malicious discrimination against him, there is not a shred of evidence to support it.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-781-S

ANTHONY EHLENFELDT,

Plaintiff,

vs.

C. W. TRANSPORT, INC.; LOCAL UNION No. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; WILLIAM CLOSE; THOMAS O'MALLEY; LEROY RANKIN and FRANK WSOL,

Defendants.

MEMORANDUM AND ORDER

Before the Court are motions for summary judgment by each of the defendants. This is an action pursuant to § 301 of the Labor Management Relations Act (29 U.S. C. § 185), charging that plaintiff's discharge from employment was without good cause, in violation of the collective bargaining agreement then in effect between his employer and union, and also charging that his union failed in its duty of fair representation. The issue presented by the motions is whether there are sufficient facts to require a trial on the issue of whether the union failed to fairly represent the plaintiff, given the standard of default necessary to make out such a case.

The facts, which are taken in the light most favorable to the plaintiff are as follows:

Copy of this document has been mailed to the following Attys. Gingras, Pierce, Benn & Uelmen, the 27th day of January, 1984, by [illegible].

FACTS

Plaintiff, Anthony Ehlenfeldt, is a resident of the State of Illinois. He was employed as an over-the-road truck driver by defendant C. W. Transport, Inc., a Delaware corporation with its principal place of business in Wisconsin Rapids, Wisconsin (hereinafter, the "employer").

Plaintiff was discharged from his employment on March 25, 1982, the employer charging that plaintiff was being discharged for failure to make a timely delivery of freight to Mauston, Wisconsin on March 24, 1982. Plaintiff had been employed by the employer for approximately 19½ years.

Plaintiff was a member of Local 710, International Brotherhood of Teamsters, based in Chicago, Illinois (hereinafter, the "union"). There was at the time of the discharge a collective bargaining agreement in effect between the union and the employer which, among other things, provided that the employer was not to discharge an employee except for cause.

The plaintiff, the employer and the union were, respectively: an "employee;" an "employer" engaged in an "industry affecting commerce;" and a "labor organization" representing employees in an "industry affecting commerce," as defined in the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* (hereinafter, the LMRA).

William Close and Thomas O'Malley are residents of Illinois and are officers and employees of the employer.

LeRoy Rankin and Frank Wsol are residents of Illinois and are officers of the union.

Plaintiff filed a grievance pursuant to the provisions of the collective bargaining agreement relating to his discharge. He asserted that the stated reason for the discharge was a pretext, and that the real reasons were that, first, his pension rights would have vested within six months of his discharge and the employer did not wish this event to occur; and second, the employer wished to penalize plaintiff for complaining of health and safety problems on the trucks that he drove. With respect to the incident on which his discharge was predicated, plaintiff claims that exhaust fumes were entering the truck which made him sick and which necessitated a stop during which he could recover from his exposure to the fumes.

Plaintiff had been cited for late deliveries on a number of occasions prior to this time. The most recent warning for such conduct was approximately six months before. Plaintiff had submitted a letter to the company regarding this warning. Other warning citations received by plaintiff were in excess of nine months old. The collective bargaining agreement did not allow consideration of warnings received more than nine months before the filing of a grievance.

Pursuant to the collective bargaining agreement, plaintiff was afforded a hearing before the Joint State Committee concerning his discharge. Plaintiff was accompanied by a union representative, defendant Frank Wsol.

Prior to the hearing, plaintiff spoke with another union representative, defendant LeRoy Rankin. Rankin informed plaintiff of the hearing and told him that the union would take care of his representation. Wsol's only contact with plaintiff prior to the hearing concerned the filing of the grievance itself.

The union made no attempt to check the mechanical operation of the truck that plaintiff had been driving. The letter plaintiff had written concerning the warning six months earlier was not put in evidence either. Wsol did not review plaintiff's personnel record because he did not have time.

Plaintiff signed a waiver of his right to ten days notice of hearing. Wsol did not advise plaintiff to not sign the waiver, and stated, in his deposition, that it is not his duty to determine whether the grieving employee is ready for the hearing.

Plaintiff's letter of termination was presented to the hearing panel. The letter stated that plaintiff had been issued "numerous warning letters for delay of freight." Wsol did not object to this statement despite the fact that only two such letters had been issued within the relevant nine-month period under the collective bargaining agreement.

Nor did Wsol present the committee with evidence of plaintiff's seniority, safe driving awards or any other evidence favorable to the plaintiff. Rankin instructed Ehlenfeldt not to present a written argument which he had prepared to the Committee at the hearing.

Plaintiff's relationship with the union was apparently good, there being no evidence presented of union animos-

ity toward the plaintiff. The argument that plaintiff was ill because of exhaust fumes was advanced by Wsol before the committee.

This action was filed on September 24, 1982, the claim being based on § 301, LMRA, 29 U.S.C. § 185.

MEMORANDUM

In order to ultimately prevail in this lawsuit, Ehlenfeldt must show that his discharge was without cause, in violation of the contract between his union and the company. But, in order to reach this question, plaintiff must first establish that his union violated its duty of fair representation. *Vaca v. Sipes,* 386 U.S. 171 (1967). The motions of the defendants address this preliminary question.

The standard of union default needed to breach the duty of fair representation has been the subject of frequent litigation in this and other circuits. While the standard has been clarified in some recent cases (which will be further discussed), this Court is troubled by the reluctance of the Court of Appeals to overrule two earlier cases which bear striking similarities to this one.

In *Baldini v. Local 1095,* 581 F.2d 145 (7th Cir. 1978), the Court reversed a grant of summary judgment to the defendants. The plaintiff had filed a grievance which had been processed through one stage of the grievance procedure and was apparently told by the union that the union would carry on through arbitration. The union then failed to fulfill its promise. Further, the union failed to bring to the company's attention the fact that the plaintiff had witnesses supporting his version of disputed facts. The Court decided that these facts supported an inference

of innocence on the part of the union and also an inference that the union's conduct was arbitrary or in bad faith. The Court concluded:

> We note also in this regard the sound axiom that questions of motive, design, and intent are particularly inappropriate for summary adjudication.

Id. at 151.

In *Miller v. Gateway Trans. Co., Inc.*, 616 F.2d 272 (7th Cir. 1980), a case strikingly similar to this one, the Court again reversed a grant of summary judgment. The *Miller* plaintiff had been warned and suspended for refusing to drive a truck which, according to him, exceeded legal height limits. He was thereafter fired for questioning the legality of the amount of time needed to complete a trip. The union representative merely read the written grievances prepared by the plaintiff and did nothing to investigate whether either of the plaintiff's legal challenges were justified. If the plaintiff's position regarding the first challenge, the height question, were upheld, he could not have been fired for the second challenge. The Court, applying as a standard the phrase "seriously undermines the integrity of the arbitral process" from *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), stated:

> The present record does not exonerate the union under this standard. So far as appears, the union's representation consisted solely of a perfunctory reading of Miller's *pro se* written grievances. No effort was made to urge the absence of the warning letter predicate to Miller's eight-day suspension. No investigation was made into the incident involving the height of the truck that gave rise to that suspension; nor was any attempt made to find witnesses to that incident or to obtain relevant records relating thereto.

> The importance of that incident to the employer's right to discharge for the later misconduct seems not to have been noticed by the union representative. Faced with such a record, we cannot say Gateway has demonstrated the absence of any genuine issue as to any fact material to the question of fair representation.

ller, 616 F.2d at 277.

The departure from this line of cases started with the case of *Hoffman v. Lonza*, 658 F.2d 519 (7th Cir. 1981). The *Hoffman* plaintiff was aggrieved by the union's apparently innocent failure to file a necessary written request to proceed to a third stage in the grievance procedure. The Court stated:

> [I]t is apparent that an action based on a duty to fairly represent cannot be based solely on some action or omission by the union that results in an employee not receiving a "fair" hearing on the merits of a grievance. The legal action based on the union's duty to fairly represent might be more properly labeled as an action for the union *intentionally causing harm to an employee involved in a grievance proceeding.* The "duty" is not breached and the employee has *no remedy without substantial evidence of fraud, deceitful action or dishonest conduct.* (Emphasis supplied)

Id. at 522. In the face of a vigorous argument in the concurring opinion that the *Baldini* and *Gateway* cases did not allow for such a strict standard, the Court noted that:

> In *Gateway*, the record indicated that the union had made no effort to represent the employee. This circumstance permitted inferences that the union's conduct was "arbitrary, discriminatory, or in bad faith."

Hoffman, at 521. Thus, without explicitly overruling a case decided on a more lenient standard, the Court of

Appeals adopted a standard which the *Gateway* plaintiff could probably not meet.

This strict standard has been solidified in more recent cases. In *Dober v. Roadway Express, Inc.*, 707 F.2d 292 (7th Cir. 1983), the plaintiff had been denied compensation for a period he spent in jail after being arrested for violating a traffic regulation. In the second stage of the grievance process, he was represented by a union representative who had never interviewed him nor investigated the grievance, and remained silent throughout the hearing. The Court stated:

> The darkest picture Dober can paint is that in substituting Coco for Navigato and then not requiring Coco to interview Dober before the hearing the union was inept, lackluster, careless; and as *Hoffman* and the cases following it make clear, negligence, even when gross, does not violate the duty of fair representation.

Id. at 294.

This statement was prefaced by a discussion of the *Hoffman* standard:

> [T]his Court "limit[ed] suits for breach of the duty to fairly represent to instances of intentional misconduct by unions." Although Judge Cudahy, in a concurring opinion, contended that a standard of intentional misconduct was too limited, and cited two earlier Seventh Circuit cases, distinguished but not overruled in *Hoffman* . . . that could be read to embrace a broader standard, a series of cases in which different panels of this Court have followed *Hoffman* make clear that it is indeed the law of this Circuit.

Id. (citations omitted). The Court then reaffirmed that the "standard is intentional misconduct." *Id.* at 295.

Judge Cudahy, concurring in *Dober* as he did in *Hoffman,* illustrates the dilemma that this Court faces in this case:

> [The majority] attempts to distinguish *Baldini* and *Miller* on the grounds that "the records in both cases indicated that the unions *may* have acted in bad faith." . . . This is hardly a legitimate basis of distinction in the face of the clear language of the opinions . . . So I must respectfully assert that *Baldini* and *Miller* stand in stark opposition to the majority's analysis here as well as to the approach in *Superczynski* [*v. P.T.O. Services, Inc.,* 706 F.2d 200 (7th Cir. 1983)]. *Baldini* and *Miller* have not been successfully distinguished, and so far as I can tell, the law of this circuit has become a function of how emphatically a panel or panels can assert the proposition of their choice in the face of clearly contrary precedent.

Id. at 296 (Judge Cudahy, concurring). This Court means to express no opinion as to what the standard ought to be; that is, whether the standard ought to be intentional misconduct or some other standard less strict. As *Dober* makes abundantly clear, that decision has been made. This Court believes that it is, in this case, faced with a situation comparable to the *Miller* and *Dober* cases, where the union's performance can be described as considerably less than conscientious.

Plaintiff in his brief paints a picture, as the Court of Appeals did for *Dober,* which characterizes his facts fairly and which this Court can accept for purposes of this motion:

> Ehlenfeldt has arguably established that the Union and its agents failed to investigate his grievance; failed to adequately advise him as to the Waiver agreement; permitted the Company to make reference

> to warning letters far outside the nine month prohibition within the Agreement; failed to present Ehlenfeldt's letter in rebuttal to the warning letter of October 29, 1981; and failed to present supportive information in Ehlenfeldt's defense. Further, Ehlenfeldt has arguably established that the Company and its agents terminated Ehlenfeldt without just cause in that numerous other employees were also guilty of delay of freight and yet were not discharged.

Pl. Brief, page 12. These facts, plaintiff asserts, create at least an inference that the defendants acted fraululently, deceitfully or dishonestly under *Hoffman.*

With all due respect, these facts do not permit an inference of intentional misconduct which is necessary under *Hoffman.* They might describe "perfunctory" performance of the union's obligation, but not of a type that can be legitimately described as *deliberate* refusal "to do more than go through the motions." *Graf v. Elgin, Joliet and Eastern Ry. Co.,* 697 F.2d 771, 778 (7th Cir. 1983). There is no evidence from which deliberateness, that is, intent, can be inferred.

This case resembles both *Dober* and *Miller.* In a sense, it is more serious an example of union failure than *Dober* because, here, the union representative did much more than sit mute. In the same sense, it is less serious than *Miller.* The *Miller* plaintiff suffered a default because his representative did nothing but read the grievance. Ehlenfeldt's representative presented some argument. Yet the Court of Appeals reversed summary judgment for the defendants in *Miller* and affirmed summary judgment for the defendants in *Dober.*

Despite the compelling similarities between this case and *Miller,* the Court must conclude that Ehlenfeldt can-

not meet the standard of default adopted, and reiterated, since that time. Plaintiff may be able to make out a case of serious failure of advocacy on the part of his union representative. But there is no evidence that plaintiff was "on the outs" with the union from which intent for the union conduct might be inferred. Cf. *Graf,* supra, at 779, *Superczynski,* supra, at 203, *Dober,* supra, at 294. In fact, the evidence, from plaintiff's deposition, is to the contrary. The Court does not fault the plaintiff for his failure to be more forceful at the time of his discharge hearing because he had reason to trust his union spokesman. But neither can the Court allow an inference of intent from the fact that plaintiff was nearing retirement. Unless the union can be shown to have had reason to punish the plaintiff, or unless there is evidence that the union makes it a practice to acquiesce in discharges of workers nearing retirement, there is no reason to believe that the union's activity was intentional or discriminatory.

This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is no evidence from which intentional misconduct on the part of the union can be inferred. The standard of intentional misconduct, it might be argued, is too strict. But the standard was set by the Court of Appeals with due regard for the consequences and the decision was a conscious one. It is not up to this Court to change it.

With regard to plaintiff's pendent state claim for conspiracy, the Court need not face the merits. Because plaintiff's federal claims are dismissed before trial, the pendent state claims must also be dismissed. *United Mineworkers v. Gibbs,* 383 U.S. 715 (1966).

Accordingly,

ORDER

IT IS ORDERED that the motions of the defendants for summary judgment are GRANTED.

IT IS FURTHER ORDERED that plaintiff's pendent state claim is DISMISSED for the lack of a substantial federal question.

Let judgment be entered in favor of the defendants dismissing the plaintiff's complaint with prejudice and costs; except that the plaintiff's pendent state claim of civil conspiracy to defraud is dismissed without prejudice.

Entered this 27th day of January, 1984.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX C

Unpublished Per Curiam Order

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1985.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. CLEMENT F. HAYNSWORTH, JR.,
Senior Circuit Judge*

ANTHONY EHLENFELDT,

Plaintiff-Appellant,

No. 84-1301

vs.

C.W. TRANSPORT, INC. and LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin. No. 82 C 781
Judge John C. Shabaz

---

*The Honorable Clement F. Haynsworth, Jr., United States Senior Circuit Judge for the Fourth Circuit Court of Appeals is sitting by designation.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action Docket No. 82-C-781-S

ANTHONY EHLENFELDT,

Plaintiff,

vs.

C.S. TRANSPORT, INC., ET AL.,

JUDGMENT

This action came on for consideration before the court, United States District Judge John C. Shabaz presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged.....

that defendants' motions for summary judgment are granted and judgment is entered in favor of the defendants dismissing the plaintiff's complaint with prejudice and costs; except that the plaintiff's pendent state claim of civil conspiracy to defraud is dismissed without prejudice.

Copy of this document has been mailed to the following attorneys: Gingras, Pierce, Benn & Uelmen this 7th day of February, 1984.

By: D.J. Meyer, Deputy Clerk.

Dated at: Madison, Wisconsin

Date: February 7, 1984

/s/ Joseph W. Skupniewitz
Clerk of the Court

APPENDIX E

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a)Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal

office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States, upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1703

In The
Supreme Court of the United States
October Term, 1984

ANTHONY EHLENFELDT,

Petitioner,

v.

C.W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN, AND FRANK WSOL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The respondent, C. W. Transport, Inc., wishes to correct certain inaccuracies and omissions in the petitioner's Statement of the Case.

Petitioner, *Ehlenfeldt,* indicates that in October of 1981 he informed the Company he would retire upon completion of 20 years employment. According to Ehlenfeldt's deposition, he merely made an off-hand comment to a company management employee that he "thought" he'd make room for a younger employee. The matter was apparently not pursued any further and the person to whom the comment was made did not participate in Ehlenfeldt's discharge in any way.

Petitioner Ehlenfeldt also states that his union steward told him after the arbitration hearing that "he thought Ehlenfeldt did not have enough pension credits to be eligible for this particular plan." In fact, the union steward told him, in response to a question from Ehlenfeldt as to how to get his pension:

> " . . . just go to the hall and check your time, but I told him I didn't think he was old enough, but if he had enough time, he could possibly get it."
>
> "Q. You said you didn't think he was old enough?
>
> A. Yeah.
>
> Q. And by that you meant he didn't have enough years or credits to receive his pension?
>
> A. No, I didn't mean it that way. I meant there's a certain age that you can freeze your pension."

It is clear the union steward was referring to chronological age, not pension credits as petitioner would have us believe.

Petitioner states that he grieved his discharge on the grounds that the delay of freight was excusable because he had become ill from exhaust fumes entering the cab. In fact, the written grievance makes no reference to petitioner being ill or that exhaust fumes entered the cab. The illness issue was not raised until the arbitration hearing and petitioner made no notation of any such defective or unsafe condition on the dispatch ticket as he is required to do by company rule, union contract and regulations of the Department of Transportation. There is evidence that the illness issue was thought up after the fact.

Petitioner makes a serious misstatement of fact when he indicates that the union "advised Ehlenfeldt to execute a Waiver of Ten Day Notice. . . ." Neither Ehlenfeldt nor any other witness ever testified that the union advised him to execute the waiver. There is no evidence upon which to base such a statement. The union representative advised him as to the effect of the waiver. The chairman of the joint arbitration board advised him of the effect of the waiver and explained his options. It was petitioner who insisted that he was prepared and insisted on proceeding with the hearing.

Finally, petitioner states that the union permitted the company to introduce evidence at the hearing which should have been disallowed under the contract. The only evidence produced by the company at the hearing was the discharge letter (which is required) and a prior warning letter dated within the contractual 9 month period (also required). The petitioner's complaint arises from the fact that the discharge letter referred to unspecified

"numerous warning letters" some of which may have been more than 9 months old.

———o———

SUMMARY OF ARGUMENT

The defendants-respondents, C.W. Transport, Inc., William Close and Thomas O'Malley argue:

1. That the standard of intentional misconduct applied by the Seventh Circuit Court of Appeals to determine whether a union has breached its duty of fair representation is mandated by decisions of this Court. Petitioner mistakenly construes the terms "arbitrary" and "perfunctory" as requiring something less than intentional conduct and therefore concludes that the standard applied by the Seventh Circuit is in conflict with *Vaca v. Sipes,* 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). When *Vaca* is considered in light of previous and subsequent cases decided by this Court, the element of intentionality is established.

2. The decisions of the various Courts of Appeal (with the possible exception of the 9th Circuit) cited by petitioner are not actually in conflict with the Seventh Circuit standard. All those Circuits have held that negligent conduct alone is insufficient to breach the duty of fair representation. Terms and phrases such as "arbitrary", "capricious", "bad faith", "perfunctory", "without concern or solicitude" and "cursory" as used in the decisions of this Court and the Courts of Appeals do imply some form of intentional conduct. Therefore, the con-

flicts, if they are conflicts, are more in the nature of form and not substance.

3. The petitioner has alleged a bare theory of malicious discrimination by the company and the union. The courts below found that the record contained no evidence to support these bare allegations. In his petition for certiorari, Ehlenfeldt makes the same bare allegation to support his argument that the courts below erred in applying the standard to the facts.

4. There is therefore no reason to issue a Writ of Certiorari to the Seventh Circuit Court of Appeals.

ARGUMENT

I.

The Standard Of Intentional Misconduct Is In Harmony With Decisions Of This Court.

This Court held that for a union to meet the obligation imposed by the duty of fair representation it is required "to make an honest effort to serve the interests of all those members, *without hostility to any.*" *Ford Motor Company v. Huffman,* 345 U.S. 330 at 337, 97 L.Ed.1048, 73 S.C. 681 (1953) (Emphasis supplied).

The standard of union conduct was further explained when this Court refused to sustain, in a 301 suit, a finding that the union had acted improperly or breached its duty of fair representation because "there is no substantial evidence of fraud, deceitful action or dishonest conduct."

Humphrey v. Moore, 375 U.S. 335 at 348, 11 L.Ed.2d 370, 84 S.Ct. 363 (1964).

In this context, this Court decided *Vaca v. Sipes,* 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967) where it was held:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

Some courts and commentators believe that the "arbitrary" standard announced in *Vaca* requires something less than intentional conduct, that some form of negligent conduct will suffice.

This Court decided that issue in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 29 L.Ed.2d 473, 91 S.Ct. 1909 (1971), *reh denied,* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 24 (1971), when it held that in order to establish a breach of the duty of fair representation a plaintiff must prove arbitrary or bad faith conduct on the part of the union (the *Vaca* standard) and that "There must be 'substantial evidence of fraud, deceitful action or dishonest conduct!'" *Id.* at 299 (the *Humphrey* standard). The Court further indicated that the doctrine of fair representation was originally developed and applied by the courts "and carries with it the need to adduce substantial evidence of discrimination that is *intentional,* severe, and unrelated to legitimate union objectives. . . ." *Id.* at 301. (Emphasis supplied)

We believe that the standard of intentional misconduct adopted by the Seventh Circuit Court of Appeals is,

contrary to petitioner's claim, in harmony with the decisions of this Court.

II.

The Alleged Conflict Between The Circuits Is One Of Form, Not Substance.

Petitioner cites *Griffin v. Intl. Union, United Auto Workers,* 469 F.2d 181 (4th Cir., 1972) as showing that the Fourth Circuit has rejected a standard of intentional conduct. That case merely applied the *Vaca* standard of arbitrary or bad faith conduct. The facts of the case clearly showed that there was substantial evidence of bad faith because union officers, who were close friends of the Operations Manager who had been assaulted by the grievant, conspired to have the grievant's case against the Operations Manager dropped. References to "arbritary" conduct were unnecessary and dicta. The 4th Circuit has specifically rejected a negligence standard in assessing whether a union has breached its duty of fair representation. In *Buchanan v. N.L.R.B.,* 597 F.2d 388 (4th Cir., 1979) the court held that failure to process a meritorious grievance or negligence does not, per se, constitute arbitrary conduct.

Likewise, with the Sixth Circuit. The case cited by petitioner merely standards for the proposition that arbitrary or perfunctory conduct does not necessarily involve bad faith or fraud. It does not say that negligent or unintentional conduct can form the basis for finding a breach of the duty of fair representation. In fact, such conduct has been specifically declared to be insufficient to establish a breach of the duty. *Journeymen Pipe Fitters Local 392 v. NLRB,* 712 F.2d 225 (6th Cir., 1983). In this case

it was held the union did not breach its duty because there was no evidence presented to suggest that the union agent acted with hostility or with a discriminatory motive toward the member. This would imply the application of a standard of intentional misconduct.

The idea of mere negligent unintentional conduct being sufficient to breach the duty of fair representation was also ruled out by the Eighth Circuit in *Curtis v. United Transportation Union,* 700 F.2d 457 (8th Cir., 1983) when it held that mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty. The proposition for which petitioner cites the case can be read to require intentional conduct. Terms such as "perfunctory", "without concen or solicitude" or "cursory" all can imply intentional conduct.

The Ninth Circuit case of *Dutrisac v. Caterpillar Tractor Co.,* 749 F.2d 1270 (9th Cir., 1983) holds that when the challenged conduct of the union is an erroneous decision regarding the merits of a grievance, or an interpretation of the contract, or the prosecution of the grievance at the arbitration hearing, then it is negligence which does *not* constitute a breach of the duty of fair representation. However, the court did hold that in cases where a union negligently fails to perform a ministerial act and where the individual interest is strong and the failure results in completely extinguishing the individual's right to preserve his claim, then such conduct may form the basis for imposing liability on the union for breach of its duty. It should be noted that the 9th Circuit previously held that conduct which shows egregious disregard for the rights of union members could violate the duty of fair representation [See *Tenario v. NLRB,* 680 F.2d 598 (9th

Pursuant to Rule 28.1, C. W. Transport, Inc. is a Delaware corporation and is a wholly owned subsidiary of Gerber Products Corporation, a Michigan corporation. No publicly held company owns ten percent or more of the stock of Gerber Products Corporation.

Cir., 1982)] and that negligence by itself could not breach the duty [*Robesky v. Quantas Empire Airways,* 573 F.2d 1082 (9th Cir., 1978)]. The concurring opinion in *Dutrisac* criticizes the majority opinion as signifying that ordinary negligence may constitute a breach of the union's duty of fair representation in spite of the explicit disclaimer to the contrary in *Robesky.* The law in the 9th Circuit does not seem to be settled.

Neither does *Faust v. IBEW,* 572 F.2d 710 (10th Cir., 1978) support the petitioner's contention of disagreement between the Circuits. There the question before the Court of Appeals was whether the trial court correctly instructed the jury as to the proper standards to apply. The court approved the trial court's submission of the *Vaca* standard and its definition of the terms "arbitrary", "capricious" and "bad faith", all of which, we believe, are just other ways of saying intentional misconduct. The evidence regarding the conduct found violative of the union's duty consisted mainly of the union's intentional insistence that the grievant personally submit the claim to them in spite of the short time available, the passing of correspondence between union officers in different states when time was short and the unexplained failure of the union to file the grievance, which it had, on time. This all implies conscious intentional conduct on the part of the union from which the jury could infer arbitrary, capricious and bad faith conduct.

The cases cited by the petitioner can stand for the proposition that some intentional conduct is required in order to find a beach of the union's duty of fair representation. Terms such as "arbitrary", "capricious" and "bad faith" have such connotations. The 9th Circuit is

the only one which has indicated that negligence, in certain limited cases, may be enough to breach the duty, and this case clearly is not one of those limited cases involving the failure to perform a ministerial act. This holding was criticized by the Dissent as being contrary to previously announced and unreversed holdings of the Court. We believe the differences in the Circuits are more of form than substance.

III.

The Court Of Appeals Did Not Err In Applying The Standard Of Intentional Misconduct To The Facts Of This Case.

The facts assumed by the District Court and quoted by petitioner is the very best case petitioner can establish. At the outset, it should be noted that the District Court did not say that petitioner had established the assumed facts, but had "arguably established" them. Petitioner claims that these facts "when viewed in light of respondent's motive to deprive Ehlenfeldt of his substantial pension benefits. . . ." created an issue of fact. The problem with that statement is that petitioner never adduced *any* evidence to support his bare theory of the respondents' motive. This alleged motive exists only in the mind of the petitioner and has absolutely no basis in fact. The courts below, after reviewing the transcripts, came to the same conclusion. The District Court observed:

> "This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is *no* evidence from which intentional misconduct on the part of the union can be inferred." App. 16, Petition for Writ of Certiorari (Emphasis supplied).

The Court of Appeals also observed:

> "Thus, while he offers a bare theory of malicious discrimination against him, there is *not a shred of evidence* to support it." App. 5, Petition for Writ of Certiorari. (Emphasis supplied.)

On the evidence adduced in this case the lower courts had no option but to find as they did.

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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Dated at Wisconsin Rapids, Wisconsin
this 28th day of May, 1985.
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Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1703

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANTHONY EHLENFELDT,
Petitioner

V.

C. W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN AND FRANK WSOL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF UNION RESPONDENTS IN OPPOSITION

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16pp

QUESTION PRESENTED

Whether the Court below properly found that the Defendant Union did not breach its duty of fair representation in the presentation of an employee grievance before a joint committee empowered to hear and decide disputes arising under a collective bargaining agreement?

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OPINION BELOW

The unpublished decision of the Court of Appeals appears in Appendix A of Petitioner Ehlenfeldt's ("Ehlenfledt") petition.

JURISDICTION

The judgment of the Court of Appeals was issued on January 29, 1985. The petition for writ of certiorari was docketed on April 29, 1985. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

A.

Proceedings Below

Ehlenfeldt's action alleged that he was wrongfully terminated under the provisions of a collective bargaining agreement between Respondents C. W. Transport, Inc., ("the Company") and Local Union No. 710 I.B.T. (the "Union") and that the Union breached its duty of fair representation in the handling of his discharge grievance which was filed under the terms of the collective bargaining agreement, all in violation of 29 U.S.C. Section 185 ("Section 301"). On January 27, 1984 the District Court granted summary judgment in favor of the Union and the Company finding no breach of the duty of fair representation (Petit. App. at 6-17). On February 7, 1984 the District Court entered its judgment (Petit. App. at 20). On January 29, 1985 the Court of Appeals issued its order and judgment affirming the District Court (Petit. App. at 1-5, 18).[1]

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[1] The individually named Respondents are apparently not a part of this petition since the entire petition focuses on the action of the Union and Company and not the individuals. In any event, there is no individual liability under Section 301. See, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 195 (1962).

B.

Statement of Facts

The facts relied on by the Court of Appeals are taken from Ehlenfeldt's depositions and the non-conclusionary facts in his complaint.[2]

Ehlenfeldt was discharged from his job as a truck driver for excessive delays in the delivery of freight. Ehlenfeldt claimed that the delay was necessitated by the fact that the cab of his vehicle filled with exhaust fumes and that his stop was a safety precaution.

The Union steward assisted Ehlenfeldt in filing a grievance and the Union agent, Wsol, unsuccessfully sought to persuade the Company to reinstate him.[3] The matter was then taken to the contract grievance procedure for a hearing before a joint committee empowered to make final and binding decisions on breaches of the collective bargaining agreement.

At the hearing before the joint committee, Ehlenfeldt was told several times that under the collective bargaining agreement's terms he was entitled to ten days notice of the hearing and that if he desired, he was entitled to additional time. Ehlenfeldt insisted that

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[2] We find it somewhat disturbing that the facts alleged by Ehlenfeldt in his Petition at 1-4 are, for the most part, the same unsupported conclusionary allegations that he simply was unable to substantiate after lengthy discovery when faced with the summary judgment motions in the District Court.

[3] During his deposition, Ehlenfeldt admitted that he told the Union agent Wsol everything he had to say concerning his discharge (Ehlenfeldt Dep. I at 34).

he wished the hearing to proceed that day.[4] The hearing proceeded and the Company's discharge of Ehlenfeldt was upheld. As Ehlenfeldt testified in his deposition, at the hearing Union agent Wsol argued that Ehlenfeldt was sick on the night in question as he claimed and that it was the Union's position that Ehlenfeldt should be reinstated to his job. Ehlenfeldt explained to the committee that he was sick because of the fumes in the cab. Ehlenfeldt was questioned about a prior warning letter and Ehlenfeldt explained that he thought that he rebutted that letter. Ehlenfeldt also explained that with regard to the discharge incident he only stopped for one hour and forty-five minutes and not three hours as the Company claimed and that he stopped a total of four times (Ehlenfeldt Dep. I at 41-42, 56-58). Towards the end of the hearing, a member of the committee asked Ehlenfeldt if he had anything else to say to the committee. Ehlenfeldt stated that he had nothing further to present (Ehlenfeldt Dep. I at 44-45, 57).[5]

Ehlenfeldt admitted that in the past he was terminated and as a result of a grievance filed and presented by the Union, the joint committee ordered that he be reinstated to his job (Ehlenfeldt Dep. I at 51-54). Further, Ehlenfeldt admitted that he has had no fights or

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[4] During his deposition, Ehlenfeldt stated that he voluntarily signed a waiver agreement (Close Dep. Exh. 4) which stated that he and the Company were ". . . aware of the issues in their dispute and do declare they are prepared for hearing of the dispute . . ." Ehlenfeldt testifed in his deposition (Ehlenfeldt Dep. II at 20-21):

Q: Did (the committee) ask you if you were ready to go ahead . . .?

A: Yeah.

Q: And you said you were?

A: That's why I signed it (the ten day waiver).

[5] Ehlenfeldt testified (Ehlenfeldt Dep. I at 57):

Q: Okay, so everything you wanted to say in support of your case was said?

A: I think so.

arguments with the Union officials and has maintained a friendly relationship with the officials with whom he dealt. Ehlenfeldt admitted that he never ran for union office, never did anything that would cause the Union to retaliate against him and was never threatened by Union officials. Ehlenfeldt also admitted that he had no evidence of fraudulent or dishonest conduct by the Union and no evidence that the Union and the Company conspired to terminate his employment (Ehlenfeldt Dep. I at 32, 46-51, 122).

REASONS FOR DENYING THE WRIT

A.

The Standard of Intentional Misconduct Is Not In Conflict With Prior Decisions of This Court

Ehlenfeldt argues that a standard of "intentional misconduct" is in conflict with prior decisions of this Court (Petit. at 5).[6] Significantly, Ehlenfeldt fails to mention the very cases from which the standard came. See, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971) ("the doctrine . . . carries with it the need to adduce substantial evidence of discrimination that is *intentional*, severe, and unrelated to legitimate union objectives . . ."); *Humphrey v. Moore*, 375 U.S. 335, 348 (1964) (" . . . there is no substantial evidence of *fraud, deceitful action or dishonest conduct*") (emphasis added).

Ehlenfeldt's reliance upon *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554 (1976) as a basis for stating that the standard used by the

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[6] The "intentional misconduct" standard has been adopted by the Seventh Circuit. *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522-523 (7th Cir. 1981). See also, *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 295 (7th Cir. 1983); *Graf v. Elgin, Joliet & Eastern Railway Company*, 697 F.2d 771, 777 (7th Cir. 1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200 (7th Cir. 1983). *Cf. Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3rd Cir. 1980) ("To violate the duty . . . it is necessary that the union act with a bad faith motive").

Seventh Circuit is contrary to this Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1966) (Petit. at 6-8) is simply incorrect. See *Hoffman v. Lonza, Inc., supra*, 658 F.2d at 522 n.2:

> *Lockridge* is quite clearly the Supreme Court's most definitive amplification of the *Vaca* language. The Court stated in *Lockridge* that for employee Lockridge to make out a claim of breach of the duty of fair representation under (Section) 301 of the National Labor Relations Act, Lockridge must have proved, "arbitrary or bad-faith conduct on the part of the union." *Vaca v. Sipes, supra* (386 U.S.) at 193 (87 S.Ct. at 918). There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' *Humphrey v. Moore, supra* (375 U.S. 335) at 348 (84 S. Ct. 363, 11 L.Ed.2d 370)." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1975) does not represent a retreat by the Supreme Court from this interpretation of *Vaca*. In *Hines* the Court stated that the employees' burden in judicially challenging the result of the arbitral process "will remain a substantial one, far too heavy in the opinion of some." *Id.* at 570, 96 S. Ct. 1048, 47 L. Ed. 2d 231. The Court then asserted that arbitral decisions where the union's representation of the employee has been "dishonest, in bad faith, or discriminatory" are subject to relitigation. *Id* at 571, 96 S. Ct. 1048, 47 L. Ed. 2d 231. There is nothing in *Hines* to suggest that the "arbitrary" conduct of *Vaca* can be less than the "deliberate and severely hostile and irrational treatment" of *Lockridge*.

See also, *Superczynski v. P.T.O. Services, Inc., supra*, 706 F.2d at 202-203.

Therefore, the "intentional misconduct" standard is consistent with this Court's prior decisions.

B.

The Standard Utilized By the Seventh Circuit Is Not In Conflict With The Standards Utilized By Other Circuits To Justify Granting the Writ Since No Court Would Find A Breach Of the Duty Under The Facts In This Case.

Under the facts of this case - one where there is no evidence of fraud, deceitful action or dishonest conduct, and one where all the evidence that the employee desired presented at his discharge arbitration hearing was, in fact, presented - even under the cases cited by Ehlenfeldt (Petit. at 8-10), no court would find a breach of the duty of fair representation and no "conflict" or "split" exists justifying granting the writ. Indeed, the cases cited by Ehlenfeldt constitute the extreme and the language cited is taken out of context. See *Griffin v. International Union, United Automobile, Aerospace and Agriculture Implement Workers Of America, UAW*, 469 F.2d 181, 183-185 (4th Cir. 1972) ("negligence in handling a grievance has not been identified as breaching the union's duty of fair representation" . . . but a breach was found since the union filed the grievance with the very individual with whom the employee had a fight and evidence existed that "the Union's handling of the grievance . . . (had) been motivated by bad faith" due to "the friendship between" the Union official instrumental in dropping the employee's grievance and the individual with whom the employee had the fight); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1103-1104 (6th Cir. 1981) ("something more than simple negligence" is necessary . . . "(a) union is not liable for mere errors in judgment if they were made honestly and in good faith" but a breach was found where evidence showed the Union simply refused to arbitrate claims filed under its collective bargaining agreement and negotiated a contract perpetuating sexually discriminatory hiring and relegated female employees to lower paying classifications etc.); *Curtis v. United Transportation Union*, 700 F.2d 457 (8th Cir. 1983) (finding of district court that union breached the duty of fair representation *reversed* since "(m)ere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty . . . there must be evidence that the union acted without concern or solicitude, or gave a claim only cursory attention . . . (a) 'union representative is not

a lawyer and he cannot be expected to function as one'"); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1272-1273 (9th Cir. 1983) ("simple negligence" insufficient in cases involving conduct other than purely ministerial acts); *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978) *modified*, 442 U.S. 42 (1979) (failure to perform a ministerial act of timely filing a grievance).[7]

This case obviously did not involve the extreme facts in those cases cited by Ehlenfeldt and did not involve an alleged breach over the purely ministerial act of filing a timely grievance. This case involved the full presentation of Ehlenfledt's grievance at an arbitration hearing. Even under Ehlenfeldt's authority, no court would find a breach of the duty in this case.

A survey in the other circuits shows that no court would find a breach of the duty of fair representation in this case. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1406 (D.C. Cir. 1983) (breach found where union adopted a policy of furnishing legal counsel with respect to grievance and other matters only to members. "The duty of fair representation does not establish an objective standard of 'adequate representation' that the union must meet at a minimum . . . (r)ather . . . a union may adopt virtually *any* non-arbitrary standard for providing representation of individual employees, so long as the standard adopted is applied in a nondiscriminatory manner . . ." (emphasis in original)); *Early v. Eastern Transfer et al.*, 699 F.2d 552, 555 (1st Cir. 1983) *cert. denied*, 104 S.Ct. 93 (1983) (fact that union lost a meritorious arbitration case does not establish a breach of the duty of fair representation since "(m)ere negligence of the union does not amount to such a breach"); *Jensen et al v. Farrell Lines, Inc. et al*, 658 F.2d 27, 29 (2nd Cir. 1981) (no breach where rational arguments were made to arbitrator); *Peterson v. Lehigh Valley District Council, United Brotherhood of Carpenters and Joiners, et al*, 676 F.2d 81, 87 (3rd Cir. 1982); *Wyatt v. Interstate & Ocean Transport Company*, 623 F.2d 888,

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[7] This Court's grant of certiorari in *Foust* and the subsequent reversal was limited to the punitive damages issue and the finding of breach of the duty was simply assumed as correct. 442 U.S. at 45 n.4, 46 n.7.

890-891 (4th Cir. 1980) (breach of duty requires conduct which is in bad faith, discriminatory, or so indifferent or grossly deficient as to be arbitrary - breach cannot be predicated upon simple negligence); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983) (union was not required to anticipate and investigate every possible argument in behalf of employee);[8] *Ruzicka v. General Motors Corp. et al*, 707 F.2d 259, 260 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 424 (1983) (reliance on past practice justifies union's action); *Brown v. Trans World Airlines, Inc.*, 746 F.2d 1354, 1358 (8th Cir. 1984) (". . . the ultimate standard governing plaintiff's unfair representation claim is not one of attorney malpractice or of negligence . . . negligence is not sufficient to establish a breach of the duty . . ."); *Castelli v. Douglas Aircraft Company*, 752 F.2d 1480, 1482-1483 (9th Cir. 1985) (union's lack of adequate investigation of grievance and failure to call key witnesses is not a breach since ". . . the grievance process need not be error free - to constitute a breach of the duty of fair representation, more than a mere error of judgment must occur (citing *Hines, supra*, 424 U.S. at 571) . . . As a result, courts will interfere with union decisions about employee grievance proceedings only if a union shows reckless disregard for the rights of an employee . . . Mere negligence on the part of the union does not constitute a breach of the union's duty . . . (i)n general, evidence of hostility, arbitrariness or bad faith is required"); *Foust v. International Brotherhood of Electrical Workers, supra*, 572 F.2d 710 (10th Cir. 1978), modified, 442 U.S. 42 (1979); *Smith v. Babcock & Wilcox Company, etc.*, 726 F.2d 1562, 1565 (11th Cir. 1984) (lack of enthusiasm by union in pursuing employee claim is not a breach).

Thus, under any circuit's interpretation of the duty, under the facts of this case, no breach would be found. This case did not involve a ministerial act of filing a grievance in a timely fashion, which may or may not be the subject of shadings and debate in some cir-

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[8] See also *Hart v. National Homes Corporation*, 668 F.2d 791, 794 (5th Cir. 1982) ("A union must be given certain latitude in resolving how the investigation and processing of a grievance is to be conducted. The legal question is not whether the employee is satisfied with the representation ... or whether it was perfect" (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953))).

cuits as to whether negligence in performing purely ministerial acts constitutes a breach of the duty of fair representation. *See e.g., Dutrisac v. Caterpillar Tractor Co., supra,* 749 F.2d 1270. *Cf. Graf v. Elgin, Joliet & Eastern Railway Company, supra,* 697 F.2d 771; *Ruzicka v. General Motors Corp., et al, supra,* 707 F.2d 259. This case involved the full presentation of a grievance in an arbitration hearing, where, as shown above, no court considers negligence as a breach of the duty. The best case Ehlenfledt could hope to make out was one of negligence by the Union and such is not a breach. In any event, the actions of the Union in this case show its conduct was far from being negligent. Ehlenfeldt voluntarily stated at the hearing that he was prepared to proceed on the day of the hearing and everything he wanted presented in support of his case was presented.

C.

The Seventh Circuit Did Not Err By Applying The Intentional Misconduct Standard To The Facts In This Case

Ehlenfeldt quotes from the decision of the District Court, but again fails to point to the relevant holding. The District Court stated (Petit. App. at 16):

> This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is no evidence from which intentional misconduct on the part of the union can be inferred.

Ehlenfeldt makes the same unsupported, almost paranoid argument that the Union had a "motive to deprive Ehlenfeldt of his substantial pension benefits" therefore creating a material issue of fact warranting trial (Petit. at 10-11). As found by the Court of Appeals (Petit. App. at 4-5) there was "not a shred of evidence to support"

such a theory.[9] Coupled with Ehlenfeldt's admitted good relationship with the Union and Ehlenfeldt's admissions that all the evidence he wanted presented in behalf of his case before the joint committee was, in fact, presented and the total lack of any evidence to support an illegal motive by the Union, the standard was properly applied to the facts of this case. Ehlenfeldt's arguments about the alleged deficiencies of the presentation by the Union are nothing more than Monday morning quarterbacking and, in any event, are irrelevant since Ehlenfeldt admitted that he agreed to proceed with the hearing and all the evidence he cared to have presented in support of his case was presented by the Union.[10]

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[9] The "strained" assertion that the Union breached the duty of fair representation because it "allowed the Company to present evidence at the hearing which should have been disallowed pursuant to the collective bargaining agreement" (Petit. at 3) only points up the frivolity of this petition. That assertion is akin to saying that either the Union or the Company could "allow" a Court to do or not to do something. The Union is only a party to the discharge hearing. The committee decides the relevancy of evidence.

[10] As noted, union agents representing employees before grievance committees are not held to the same standard of care that a lawyer owes his client. *See Curtis v. United Transportation Union, supra,* 700 F.2d at 458 ("A 'union representative is not a lawyer and he cannot be expected to function as one'"); *Dober v. Roadway Express, Inc., supra,* 707 F.2d at 294-295; *Graf v. Elgin, Joliet & Eastern Railway, supra,* 697 F.2d at 779.

CONCLUSION

Wherefore, for the above reasons, the Union Respondents submit that the Petition should be denied.

Respectfully submitted,

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